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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 219

MAPLE ISLAND FARM, INC.,
Petitioner,

vs.

WALTER BITTERLING

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 219

MAPLE ISLAND FARM, INC.,

Petitioner,

vs.

WALTER BITTERLING,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, EIGHTH CIRCUIT

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Maple Island Farm, Inc., hereby petitions for a writ of certiorari to the Court of Appeals of the Eighth Circuit, to review the decision of that court on the issue of the jurisdiction of the District Court of the District of Minnesota, Third Division, upon which issue the Court of Appeals filed its decision on April 24, 1952, and respectfully shows:

Summary Statement

This action was brought in January, 1949, in the District Court of Minnesota, Third Division, by Walter Bitterling, as plaintiff, against Maple Island Farm, Inc., as defendant,[1]

[1] For uniformity of reference and to avoid confusion, petitioner will be designated herein as defendant and respondent as plaintiff.

to recover upon two alleged oral contracts, under one of which plaintiff claimed commissions on all of defendant's powdered milk products distributed in Mexico through a certain Mexican distributor, and under the other of which plaintiff claimed damages for breach of contract to pay him commissions on all of the defendant's powered milk products exported into Venezuela so long as defendant continued to export into that country.

The case was tried to the District Court without a jury beginning June 5, 1950, and was decided on June 13, 1951. Plaintiff was given judgment for $168,056.39.

Federal jurisdiction was claimed by plaintiff solely upon diversity of citizenship. Defendant is a Minnesota corporation. Plaintiff alleged that he was a citizen of the United States and of the State of Oklahoma. Defendant concedes plaintiff's national citizenship, but put in issue his claim of state citizenship, and opposed the jurisdiction of the Court on the ground that plaintiff was not a citizen of any State, it being defendant's contention that plaintiff failed to sustain his burden of proof on that issue, and that, on the contrary, it conclusively appeared that plaintiff had established a domicile in Caracas, Venezuela, and therefore had lost his citizenship of Oklahoma, if such he ever had. The District Court "found" only that the plaintiff was a citizen of Oklahoma and concluded that it had jurisdiction of the action. The Court, however, made no finding as to any underlying fact upon which state citizenship depends, such as residence, domicile, intention, or the like. In its opinion the District Court commented:

> "The plaintiff is a citizen of Oklahoma, but has devoted about fifteen years to business in Mexico, Venezuela and other South and Central American countries. * * *" (R. 61.)

After denial of its motion for amended findings of fact and conclusions of law and for dismissal or a new trial, defendant took an appeal to the Court of Appeals of the Eighth Circuit. After the case was there docketed defendant moved the Court for hearing and decision on the issue of jurisdiction separately from and in advance of the many other issues in the case. The Court made an order permitting defendant to file a record pertaining to the issue of jurisdiction, together with a motion for dismissal and brief in support of that motion. Defendant filed such a record, motion, and brief, following which the Court made an order directing an advanced and separate presentation of the issue of jurisdiction and permitting plaintiff to file a supplemental record and brief. This was done, and defendant filed a response. (R. 3-25.) The evidence on the issue of jurisdiction, as presented by the special record, consisted entirely of plaintiff's own testimony and certain written documents not questioned by him. There was, therefore, in the Court of Appeals no dispute as to the facts on this issue. The matter was placed on the calendar and orally argued on March 7, 1952. On April 24, 1952, the Court of Appeals filed its decision affirming the conclusion of the District Court that plaintiff was a citizen of Oklahoma and sustaining the jurisdiction. (R. 26-88; 89-97.)

The affirmance resulted from the expressed view of the Court of Appeals that the finding by the District Court that plaintiff was a citizen of Oklahoma was conclusive upon the Court of Appeals unless "clearly erroneous," and that it was unable to hold that finding clearly erroneous. To exercise an independent judgment on the question was considered to be beyond the Court's proper powers of review. (R. 96-97.)

A petition by defendant for rehearing (R. 99-114) was

denied by order filed May 13, 1952. (R. 115.) A further outline of the facts relating to jurisdiction will appear in the accompanying brief.

Basis of Jurisdiction

This Court has jurisdiction to issue the writ applied for under Article 3, Section 2, Clauses 1 and 2, of the Constitution of the United States and under the Act of Congress of June 25, 1948, 62 Stat. 928, 28 U.S.C.A., Section 1254 (1), authorizing this Court to review cases in the courts of Appeal "by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." [2]

Reasons Relied Upon for Allowance of Writ

1. The decision of the Court of Appeals is in conflict with the decisions of other courts of appeal on each of the questions presented.

2. The Court of Appeals has decided a federal question in a way that is in conflict with the applicable decisions of this Court and several Courts of Appeal.

3. The Court of Appeals has rendered an important decision of general interest contrary to law as pronounced by this Court and by other courts of appeal.

Questions Presented

The ultimate question is whether the District Court had jurisdiction upon the ground of diversity of citizenship. This in turn depends upon whether plaintiff was at the commencement of the action a citizen of Oklahoma. The particular questions presented by the decision of the Court of Appeals, the review of which is sought by petitioner, are these:

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[2] The decision of the Court of Appeals is its "judgment" within this statute. *Rogers* v. *Hill*, 289 U.S. 582.

1. In reviewing the "finding" of the District Court in question, was the Court of Appeals so bound by it that its powers of review were exhausted by the conclusion that the finding was not "clearly erroneous," or should the Court with respect to this finding have exercised an independent judgment. This presents the further questions:

(a) Does a naked finding of state *citizenship* present to a court of appeals a question of fact, a conclusion of law, or a mixed question of law and fact.

(b) Does a deduction or inference of state citizenship from undisputed facts present to a court of appeals a question of fact, a conclusion of law, or a mixed question of law and fact.

(c) On mixed question of law and fact what is the scope of review in the courts of appeal.

(d) Is domicile in a state or country to be presumed from residence therein, in the absence of evidence against such presumption.

(e) Does the record on jurisdiction, either with or without the aid of the presumption from residence, require a reversal of the District Court's finding of plaintiff's citizenship of Oklahoma.

Respectfully submitted,

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Of Counsel.

BRIEF

Grounds of Jurisdiction

The basis of jurisdiction is stated in the Petition (p. 4, ante).

Statement of Case

The procedural history, the nature of questions presented, and their evolution are covered by the Summary Statement and Questions Presented (pp. 1 and 5, ante, of Petition).

A very brief general outline of the facts on the issue of jurisdiction, the sole question decided by the Court of Appeals, and on the state citizenship of plaintiff, on which jurisdiction depended, is as follows:

Plaintiff was born in Montana. He attended grade and high schools in Tulsa, Oklahoma, and was there employed during one year. He left Oklahoma in 1934 or 1935, at about the age of thirty years, and went to Venezuela. This was 14 or 15 years before the commencement of the action. Between the date of his birth in Montana and his arrival at age thirty, he had *resided* in North Dakota, South Dakota, Illinois, and Alabama. Upon leaving Oklahoma he spent approximately the next four years in Venezuela. Then followed six years divided between Venezuela, other South American countries, the Caribbean Islands, and Africa, with three relatively short visits to the United States. His trips to the United States during this period were not on account of any business located in this country, but were incidental to his foreign, including Venezuelan, employments. Beginning in 1944, and continuing thereafter, he established himself in business in Caracas and set up a residence and *home* there, which was maintained up to the time of trial (R. 42-50; 54-61).

These facts are sufficient for consideration of all questions presented except the final one, and further factual

details are deferred to the discussion of that question, in the interest of clarity.

Summary of Argument

The District Court's conclusion as to its jurisdiction upon the ground of diversity rested upon its so-called "finding" that "Plaintiff is a citizen of the State of Oklahoma and of the United States of America." National citizenship being admitted, only the Oklahoma state citizenship of plaintiff was in question. The District Court's determination of that question was presented for review to the Court of Appeals upon a record of undisputed evidence.

The Court of Appeals erred and placed itself in conflict with other courts of appeal by holding that it was bound by the bare "finding" by the District Court of plaintiff's state citizenship unless that finding was seen to be "clearly erroneous." This "finding" was not binding on the Court of Appeals, and an independent judgment on the question should have been exercised because (a) the conclusion of the District Court as to plaintiff's state citizenship was not rested upon any finding of supporting facts; (b) the controlling facts were undisputed; (c) the question presented to the Court of Appeals was either one of law or a compound of law and fact. The Court of Appeals further erred and created a conflict in failing to recognize or apply the presumption of plaintiff's domicile from plaintiff's residence in Venezuela. There was no evidence tending to overcome this presumption, and therefore, by reason of the presumption, and under all the facts, plaintiff's domicile in Caracas was conclusively established. This terminated his citizenship of Oklahoma, if he ever was a citizen of that State, and left no basis for jurisdiction of the District Court.

Argument and Authorities

State Citizenship Essential to Diversity

Plaintiff's conceded national citizenship does not imply citizenship of any State. While one may not be a citizen of a State unless he be a citizen of the United States, the reverse is not true. By establishing a foreign domicile, and nothing more, a citizen of the United States and of a State loses his state citizenship while retaining his national citizenship. *Slaughter-House Cases,* 16 Wall. 36, 21 Law. Ed. 394; *Hammerstein* v. *Lyne,* (D.C. Mo.) 200 F. 165; *Alla* v. *Kornfeld,* (D.C. Ill.) 84 F. Supp. 823; *Pannill* v. *Roanoke Times Co.,* (D.C. Va.) 252 F. 910; *Prentiss* v. *Brennan,* (C.C. N.Y.) 19 Fed. Cases 1278, No. 11,385; *Cooper* v. *Galbraith,* (C.C. Pa.) 6 Fed. Cases 472, No. 3193.

The basic test of State citizenship is prescribed by the Fourteenth Amendment, Sec. 1, Clause One, which reads:

> "All persons born or naturalized within the United States and subject to the jurisdiction thereof, are citizens of the United States *and of the state wherein they reside.*"

Burden of Proof

The burden of proving all jurisdictional facts was upon the plaintiff. *Kurn, et al.* v. *Beasley,* 8 Cir., 109 Fed. 2d 687; *Mulligan* v. *Federal Land Bank,* 8 Cir., 129 Fed. 2d, 438; *Le Mieux Bros., Inc.* v. *Tremont Lbr. Co.,* 5 Cir., 140 Fed. 2d 387, 389; *Badger* v. *Reich Bros. Const. Co.,* 5 Cir., 161 Fed. 2d, 289; *Mitchell* v. *Maurer,* 293 U. S. 237, 244; *McNutt* v. *General Motors Acceptance Corporation,* 298 U. S. 178; *Thomson, Trustee* v. *Gaskill,* 315 U. S. 442.

Upon the plaintiff, therefore, rested the burden of proving "residence" in a State within the meaning of the constitutional provision above quoted.

Decision of the District Court

Under the caption "findings of fact" the District Court declared "Plaintiff is a citizen of the State of Oklahoma and of the United States of America," and under the caption "conclusions of law" is the stated conclusion "The court has jurisdiction of the parties and of the subject matter of this action." In its opinion the Court said: "The plaintiff is a citizen of Oklahoma, but has devoted about fifteen years to business in Mexico, Venezuela and other South and Central American countries" (R. 61-62).

This is all that is to be found in the Court's findings of fact, conclusions of law, or opinion on the subject of the plaintiff's challenged state citizenship and of jurisdiction. There was no finding of any "primary, evidentiary or circumstantial facts" such as referred to by this Court in *Bogardus* v. *Commissioner*, 302 U. S. 34, 39, as distinguishing findings of fact from conclusions of law or determinations of mixed questions of law and fact. Thus there was no finding as to plaintiff's residence, domicile, home, intention, or the like.

Decision of the Court of Appeals

The Court of Appeals considered itself bound by the quoted "finding" of the District Court that plaintiff was a *citizen* of Oklahoma. Referring to domicile the Court said:

> "The question of domicile is a mixed question of law and fact, but mainly one of fact. Philadelphia & Reading Ry. Co. v. Sherman, 2 Cir., 230 Fed. 814."[3]

But then added:

> "The determination of the *fact* is * * * by the court if tried by the court, and such determination is conclusive unless clearly erroneous."

[3] This decision does not deal with the subject of domicile or citizenship.

Here the Court said in effect that a finding of domicile could not be reversed unless clearly erroneous. The Court then applied the same rule to a finding of citizenship. It said:

> "Were we the triers of the *fact* in the first instance we might have concluded that he had lost his citizenship in Oklahoma,[4] * * * We cannot upon this record, however, hold that the Court's finding is clearly erroneous. *Accordingly* the finding of the Court that the plaintiff was and is a citizen of Oklahoma is affirmed" (R. 97).

From this it is apparent that the Court's decision rested upon the theory that the District Court's conclusion as to plaintiff's state citizenship was a finding of fact binding upon the Court of Appeals unless clearly erroneous, and that there was no authority in the Court to exercise an independent judgment on the question.

A Finding of Domicile or Citizenship is a Compound of Law and Fact

Domicile and a fortiori state citizenship are mixed questions of law and fact. *Sweeney* v. *District of Columbia* (C.A. D.C.) 113 Fed. 2d 25; *Shilkret* v. *Helvering*, (C.A. D.C.) 138 Fed. 2d 925; *New York Trust Co.* v. *Riley*, 24 Del. Ch. 354, 16 A. 2d 772, 783, affirmed 315 U. S. 343.[5]

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[4] The Court's comment that "we might have found that he was domiciled in New York where he lived from November 1947 to February 25, 1948, as vice president of International Trade Service" was evidently inadvertent, since plaintiff made no claim that he ever had a legal residence or domicile in New York or that he was ever a citizen of that state, and there was no such issue in the case.

[5] The decisions of the district courts and of the appellate courts of the States are in accord with this rule. *Hicks* v. *Hicks*, (D.C.) 80 Fed. Supp. 219; *Taylor* v. *Milam*, (Ark.) 89 Fed. Supp. 880; *Hartzler* v. *Radeka*, 265 Mich. 451, 251 N.W. 554; *State* v. *Brazda*, 141 Neb. 817, 5 N.W. 2d 206; *In re Trowbridge Estate*, 266 N.Y. 283, 194 N.E. 756; *Ex Parte Altman*, 237 Ala. 642, 188 So. 685; *Holmes* v. *Holmes*, 212 Ala. 597, 103 So. 884; *Macqueen* v. *Macqueen*, 131 Fla. 448, 179 So. 725; *Talley* v. *Commonwealth*, 127 Va. 516, 103 S.E. 612; *In re Weed's Estate*, 120 Cal. 634, 53 Pac. 30.

Ascertainment of state citizenship involves application to the facts of Section 1 of the Fourteenth Amendment and the decisions construing it. In a case like the present, where the facts are undisputed, the determination of state citizenship becomes a conclusion of law.[6] Assuredly, it is not solely a question of fact.

Review of Mixed Questions of Law and Fact

A district court's conclusion on a mixed question of law and fact is open to review in the courts of appeal in the exercise of an independent judgment. *First National Bank* v. *Hartford*, 273 U. S. 548, 552; *Helvering, Commissioner* v. *Tex-Penn Oil Co.*, 300 U. S. 481, 490; *Bogardus* v. *Commissioner*, 302 U. S. 34, 38; *Helvering* v. *Coal Co.*, 4 Cir., 95 Fed. 2d 732; *Commissioner* v. *Wilson*, 7 Cir., 125 Fed. 2d 307; *Commissioner* v. *Fiske's Estate*, 7 Cir., 128 Fed. 2d 487, certiorari denied, 317 U. S. 635; *Ross* v. *Commissioner*, 5 Cir., 129 F. 2d 310; *Thornley* v. *Commissioners*, 3 Cir., 147 Fed. 2d 416.

The decision of the Court of Appeals in this case is in conflict with this rule and with the cited decisions establishing and applying it.

District Courts' Inferences from Undisputed Facts Are Not Binding on Courts of Appeal

The only evidence on the question of plaintiff's state citizenship is the uncontroverted testimony of plaintiff himself and written documents not questioned by plaintiff. Defendant rested its case on jurisdiction solely on that evidence. There was no controversy as to weight of testimony, credibility of evidence or veracity of witnesses. In-

[6] See *Hartzler* v. *Radeka*, 265 Mich. 451, 251 N.W. 554, in which the Supreme Court of Michigan applied this rule to a determination of domicile, saying: "The question of domicile, when the facts are settled, is one of law."

ferences drawn or findings made from such evidence by district courts are not binding upon courts of appeal, but are there subject to full review and the exercise of independent judgment. Such is the holding of many of the circuit courts. *Kuhn* v. *Princess Lida*, 3 Cir., 119 Fed. 2d 704; *Himmel Bros.* v. *Serrick Corporation*, 7 Cir., 122 Fed. 2d 740; *Equitable Life Assurance Society* v. *Irelan*, 9 Cir., 123 Fed. 2d 462; *Fleming* v. *Palmer*, 1 Cir., 123 Fed. 2d, 749, certiorari denied, 316 U. S. 662; *Smith* v. *Royal Insurance Co.*, 9 Cir., 125 Fed. 2d 222, certiorari denied, 316 U. S. 695; *Wigginton* v. *Order of United Commercial Travelers*, 7 Cir., 126 Fed. 2d 659, certiorari denied, 317 U. S. 636.

In refusing to recognize and apply that principle, the Court of Appeals in this case rendered a decision in conflict with the cited decisions from other circuit courts.

Residence Is Prima Facie Evidence of Domicile

As will appear from the discussion of the topic immediately following (under the caption "Plaintiff was not a Citizen of Oklahoma"), it conclusively appears from the record that for many years prior to, and at the commencement of this action, plaintiff's sole place of residence was Caracas, Venezuela. The presumption from this is that Caracas was his place of domicile in the absence of evidence to the contrary. There was no contrary or qualifying evidence, hence the presumption was conclusive. *Granite Trading Corporation* v. *Harris*, 4 Cir., 80 Fed. 2d 174; *Helvering* v. *Campbell*, 4 Cir., 139 Fed. 2d 865; *Rogers* v. *Rogers*, (C.A. D.C.) 130 Fed. 2d 905; *E. I. Dupont de Nemours & Co.* v. *Byrnes*, 2 Cir., 101 Fed. 2d 14; *Ennis, Admr.* v. *Smith, et al*, 14 How. 400, 14 L. Ed. 472, *Anderson* v. *Watt*, 138 U. S. 694, 706; *The Venus*, 12 U. S. 253, 8 Cranch. 253, 3 L. Ed. 553; *Texas* v. *Florida*, 306 U. S. 398; *District of Columbia* v. *Murphy*, 314 U. S. 441.

Although this presumption was strongly urged on the Court of Appeals, the Court failed to apply it and arrived at a decision inconsistent with it, thus creating a conflict between it and other courts of appeal. Disregard of this presumption had the effect of shifting the burden of proof on domicile from plaintiff to defendant. The Court erroneously imposed on defendant the burden of proof regarding plaintiff's intention to remain in Venezuela. It said (R. 97):

> "He was not asked and did not say as a witness that he intended to remain in Venezuela either indefinitely or permanently. His intention must be deduced, therefore, from all the circumstances in evidence."

This not only was a negation of the presumption of domicile from residence, but also involves a misconception of the intent which is taken as evidence of a change of domicile. It was not a question of whether plaintiff intended to remain in Venezuela. It was a question of whether he had a fixed and definite intention of returning to Oklahoma. *Rogers* v. *Rogers*, (C.A. D.C.) 130 Fed. 2d 905; *District of Columbia* v. *Murphy*, 314 U. S. 441. Or at least had a fixed and definite intent *not to remain* in Venezuela. *Williamson* v. *Osenton*, 232 U. S. 619. The burden in this respect was on plaintiff.

Plaintiff Was Not a Citizen of Oklahoma

Development of this point requires some further outline of the facts appearing from the record on jurisdiction, particularly in relation to the five years immediately preceding the commencement of the action.

Prior to the year 1944 plaintiff's activities in Venezuela and elsewhere were as an employee of others. In that year he began, and continued thereafter, to establish and maintain himself in business in Venezuela on a proprietary

basis. He became president of a Venezuelan corporation organized by himself and an associate to act as representative in Venezuela of foreign manufacturers. He acquired a partnership interest in another old established Venezuelan corporation. In 1946 he helped organize and became president of a corporation to act as distributor in Venezuela for defendant's powdered milk products. The headquarters of all these corporations was at Caracas. In April, 1947, he organized a Venezuelan corporation "to import, distribute and service moving picture equipment, sound equipment of all kinds, interoffice and short wave communication equipment, a line of domestic radios, records, cameras, electronic equipment, and any other line that will lend itself to our activities in the Venezuelan market." (R. 44; 46-49; 55-56.)

In 1948 he projected many business enterprises in which he proposed to engage or participate in Venezuela, as appears from his and defendant's exhibits (R. 53—). He made income tax returns in Venezuela (R. 52-53), and July 20, 1948 wrote: "For income tax purposes I am going to incorporate my name and set up books here in Venezuela." (R. 57.)

He testified that as early as 1944 he made his *home* in Caracas. In his testimony he referred six different times to Venezuela as his *home*. In 1946 he and a brother and two sisters were together making their home in an apartment in Caracas. This was the situation at the time of the trial. He expressly testified that he then maintained a *home* in Venezuela. (R. 44-45; 47-48.) In a response to a pretrial interrogatory, affirmed upon the trial, he said, "Plaintiff's place of residence is Caracas, Venezuela. Plaintiff's last state of permanent residence in the United States, Oklahoma." (R. 51.) He married in New York in June, 1946, respecting which he testified:

> "In 1946, on June 14, I was married. My wife accompanied me to Venezuela to take up legal residence and we arrived there on August 3, 1946."

In 1948 he procured a divorce from his wife in Caracas in an action in which she did not appear. (R. 50-51.)

There is much other evidence in the record tending to demonstrate the permanence of plaintiff's attachment to Venezuela and the permanence of his residence at Caracas.[7] In his brief on jurisdiction filed in the Court of Appeals, plaintiff admitted residence in Caracas "for about eleven months preceding this action." This would include the months of March, 1948 to January, 1949, both inclusive.

Plaintiff's repeated admission that Caracas was his *home*, as well as the site of his residence, definitely places his domicile there. The words "domicile" and "home" are virtually synonymous. *Texas* v. *Florida*, 306 U. S. 398; *Gallagher* v. *Philadelphia Transportation Co.*, 3 Cir., 185 Fed. 2d 543; Restatement Conflict of Laws, Secs. 9, 12, 15, 19, 20. Many State appellate courts have so declared.[8]

Negatively, there is not only a complete absence of any evidence that plaintiff had the remotest intention of ever returning to Oklahoma, but also the record is equally barren

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[7] Plaintiff's concept of the nature of his abode in Caracas appears from numerous excerpts from his testimony. For illustration, when asked, "How does the cost of living in Venezuela compare with the cost of living in the United States," his answer was, "I don't have very much experience with the cost of living in the States, other than as a *travelling man*, which is quite expensive. In Venezuela I maintain a *home*." (R. 45.) When asked the extent of his contacts with field operation of the oil companies in Venezuela, he answered, "Over a period of approximately 15 or 16 years with certain *interruptions* due to *absences* from Venezuela," (R. 49.) Venezuela was primary; absences were interruptions. Respecting his 1948 employment to represent defendant in Venezuela, plaintiff testified, "It was in my mind that we would be selling powdered milk for many years." (R. 49.)

[8] *In re Schultz Estate*, 316 Ill. App. 540, 45 N.E. 2d 577; *Zimmerman* v. *Zimmerman*, 175 Ore. 585, 155 P. 2d 293; *Slater* v. *Monroe*, 313 Mass. 538, 48 N.E. 2d 149, *In re Coppock's Estate*, 72 Mont. 431, 234 P. 258.

of the slightest evidence of any fact or circumstance which might supply a motive or inducement to return to that State. There is no evidence that since his departure from Oklahoma in 1934 or 1935 plaintiff had any business or social interest in that State, or had any place of residence, property, relatives or friends there, or that he ever voted or paid a tax or exercised any of the privileges or discharged any of the duties of citizenship there or ever intended to. There is not a particle of evidence in any way tending to negative plaintiff's abandonment of domicile in Oklahoma (if he ever had one there) by his departure therefrom and the admitted establishment by him of a residence in Caracas, Venezuela. In this state of the record, and irrespective of the presumption of domicile from residence, the only justifiable conclusion is that at the commencement of the action plaintiff was without domicile or citizenship in Oklahoma and that the District Court was without jurisdiction of the action.

Petitioner therefore prays the issuance of a Writ of Certiorari to the Court of Appeals of the Eighth Circuit.

1. To resolve the conflict between the decision of that Court in this case and the decisions of other courts of appeal by a determination that

(a) A "finding" which consists only of inferences or deductions from undisputed facts is in reality a conclusion of law.

(b) State citizenship depends upon a compound of law and fact.

(c) A "finding" of state citizenship from undisputed facts is in effect a conclusion of law.

(d) A district court's naked "finding" of state citizenship is open to review in the courts of appeal in the exercise of an independent judgment, especially where the facts are undisputed.

(e) Residence in a state or country is *prima facie* evidence of domicile therein and becomes conclusive of such domicile in the absence of evidence sufficient to overcome the presumption.

2. To review the question of whether the record of undisputed evidence in this case is sufficient to sustain the jurisdiction of the District Court or whether, on the contrary, it reveals the lack of such jurisdiction.

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(2807)

IN THE

Supreme Court of the United States

OCTOBER TERM 1952

NO. 219

MAPLE ISLAND FARM, INC.,

Petitioner,

vs.

WALTER BITTERLING,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BASIS OF JURISDICTION

Defendant seeks to invoke the jurisdiction of this Court under the provisions of 62 Stat. 928 (1948), 28 U. S. C. A. Sec. 1254 (1) (1948) which reads in part as follows:

> "Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *"

Since this writ is sought in order to obtain a review of the decision made by the Court of Appeals, it appears that Defendant is asking this Court to treat that decision as if it were a judgment. Whether the Court of Appeals' decision on this fragmentary appeal is a judgment and whether it is a final judgment is not entirely clear, but Plaintiff does not wish to belabor the point further than to invite the Court's attention to Plaintiff's earlier brief in opposition to Defendant's "piecemeal" appellate procedures. (See R. 8 to 18)

A few additional matters deserve discussion in connection with the jurisdictional problems presented by this petition. It is important to consider that Defendant, upon submitting this petition to the highest Court in the land, has now run the entire gamut of the Federal Appellate Court system seeking the special and unprecedented privilege of a "piecemeal" review of its case on an issue which it did not regard as being of sufficient importance to press in the Trial Court until after an adverse decision on the merits. (R. 82) At no time during the extended trial of this action did Defendant actively contest the issue of jurisdiction. When Defendant submitted a lengthy brief after trial it purported to and did

set forth and exhaustively discuss all issues in the case. (R. 11) In that brief, neither Plaintiff's citizenship nor the issue of jurisdiction were mentioned. (R. 11) Furthermore Defendant without any reservation of a challenge on jurisdiction asserted, proved, and submitted proposed findings asking (and was granted) judgment on a counterclaim against Plaintiff (R. 11, 62).

It is fundamental, of course, that jurisdiction in the Federal Courts is always in issue whether affirmatively raised by the pleadings, whether actively contested or whether wholly ignored in all previous proceedings. Obviously, if Federal jurisdiction does not exist in fact,[1] no act or omission of the parties or their counsel at any step in the action can serve to remedy the fatal defect. However, this Court has indicated that the timeliness of an objection to jurisdiction is definitely a factor to be considered in passing upon the issue at any later stage in the action. In *Deputron v. Young,* 134 U. S. 241, 252, 10 S. Ct. 539, 543, 33 L. Ed. 923 (1890), this Court, in considering a case which involved a tardy objection to jurisdiction, stated:

> "* * * we remark in passing that such an objection (to jurisdiction) ought to be raised at the first opportunity and delay in its presentation should be considered in examining into the grounds upon which it is alleged to rest."

In *Simpson v. Phillipsdale Paper Mill Co.,* 223 Fed. 661, 663, (D. C. Mass 1915) the Court commented on the *Deputron* case, *supra,* and stated:

[1] Federal Courts have emphasized that it is the fact of diversity, with which they are most concerned. Hence it is interesting to note that the Court of Appeals, while affirming the finding on Plaintiff's Oklahoma domicile and citizenship commented that it might have found that he was domiciled in New York. (R. 97)

> "In Deputron v. Young many months had gone by since the case was at issue, and it had been tried on the merits and decided against the petitioner *before the petition to dismiss was filed.* Obviously, under such circumstances, every doubt as to the jurisdiction ought to be resolved in favor thereof." (Italics supplied.)

Plainly the Federal Courts have expressed displeasure and disapproval of a party who in a sense sails forward on the merits while silently saving an objection to the Court's jurisdiction as an "anchor to windward" should he lose on the merits. *Parker Washington Co. v. Cramer,* 201 Fed. 878 (7th Cir. 1912)

ARGUMENT AND AUTHORITIES

INTRODUCTION

Defendant's petition for certiorari asserts that in this case the decision of the Court of Appeals is in conflict with the decisions of this Court and with the decisions of the Federal Appellate Courts in other circuits on (1) the scope of appellate review in Court tried cases and (2) the presumptions governing determination of citizenship. For good measure, Defendant's petition asserts that the Trial Court's finding on citizenship is not supported by the evidence. We do not understand the latter claim to be a ground for seeking certiorari.

The ultimate purpose of Defendant's Petition is to have this Court review the evidence to determine whether it is sufficient to sustain the finding that Plaintiff was a citizen of Oklahoma when this action was commenced in January, 1949.

One District Judge, who heard the case for nearly seven weeks, was persuaded that Plaintiff was a citizen of Oklahoma and so found. (R. 61) When the finding on this issue was challenged by Defendant *after* judgment and Plaintiff moved to reopen for the taking of additional evidence if there was any doubt on the point, the Trial Judge vigorously reaffirmed his finding. (R. 62, 63, 82, 83) Three Court of Appeals' judges, who thereafter reviewed this issue, separated from all other issues in the case, affirmed the District Court. (R. 89, 90-98) When the soundness of its decision was challenged by a Petition for rehearing, the Court of Appeals denied the Petition summarily without opinion. (R. 99-115) Furthermore, Defendant's own able counsel appear to have once shared the conclusion that Defendant's Oklahoma citizenship was abundantly proved, since Defendant's comprehensive brief in the Trial Court failed even to mention, let alone argue, jurisdiction or diversity. (R. 10, 11)

I. The Scope of Review in Court Tried Cases

Since this case was tried by the Court without a jury, the scope of review exercised by the Court of Appeals was governed by Rule 52 (a) of the Federal Rules of Civil Procedure which provides in part that:

> "* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses * * *"

One of the leading United States Supreme Court cases construing rule 52 (a) is *United States v. Yellow Cab Co.*, 338 U. S. 338, 70 S. Ct. 177, 94 L. Ed. 150 (1949), which is

cited in the Court of Appeals' decision. (R. 96) In that case, this Court held that a party may not come to an Appellate Court for what virtually amounts to a trial *de novo* on the record of such findings as *intent,* motive and design and that a finding is not clearly erroneous where the evidence would support a conclusion either way but where the Trial Court has decided it to weigh more heavily for one of the parties. The *Yellow Cab Co.* case, involving as it did a matter of intent, is clearly in point on the present case where, the fact of a business residence in Caracas for less than one year preceding this action being admitted, the determination of Plaintiff's Oklahoma citizenship rested primarily upon determining Plaintiff's intention. In following the decision of this Court in the *Yellow Cab Co.* case, the Court of Appeals' decision was completely in accord with (and not contrary to) the latest decisions of this Court[2] and with the decisions in other circuits.[3]

The nature of the evidence in this case is such that the determination of Plaintiff's citizenship was a matter peculiarly within the province of the trier of fact. The evidence is largely Plaintiff's own activities and testimony. At the trial Defendant took some pains to challenge Plaintiff's credibility generally. The evidence upon which Defendant places principal reliance is made up of certain documents and testimony which contain ambiguous language. Since the evidence on Plaintiff's intention was necessarily circumstantial, the Trial Court was obliged to draw many infer-

[2] See also, *Timken Roller Bearing Co. v. United States,* 341 U. S. 593, 71 S. Ct. 971, 95 L. Ed. 1199 (1951); *United States v. National Ass'n. of Real Estate Bds.,* 339 U. S. 485, 70 S. Ct. 711, 94 L. Ed. 1007 (1950).

[3] *Remington Rand, Inc. v. Societe Internationale,* 188 F. (2d) 1011, 1013 (App. D. C. 1951); *Mine Hill & Schlylkill Haven R. Co. v. Smith,* 184 F. (2d) 422, 426 (3rd Cir. 1950); *United States v. Fotopulos,* 180 F. (2d) 631, 634 (9th Cir. 1950); *Widney v. United States,* 178 F. (2d) 880 (10th Cir. 1949)

ences from the evidence to determine Plaintiff's intention. The drawing of inferences is the very essence of appraising and using circumstantial evidence.

It must also be remembered that this was a long trial. It lasted nearly seven weeks. Numerous witnesses were heard and their testimony covers approximately 3000 pages of transcript. An estimated 2000 pages of exhibits were considered. In hearing and considering all of the evidence in the case, including the evidence on the merits, the Trial Judge acquired a wealth of detailed background information on Plaintiff's activities during the period which is important to a determination of his citizenship. He also gained a keen insight into the nature of Plaintiff's work, his manner of thinking and speaking, his habits, his attitudes and manner of living. In short, he had the best possible frame of reference into which he could fit the specific evidence that enabled him to determine Plaintiff's true intention as it affected his domicile and citizenship. By the same token he was in the best possible position to give words of testimony and language of documents the meaning they appeared to have in the context of the entire case. He was able to draw his inferences from all the evidence in the case. Having been thus uniquely situated and having lived with the facts of this case through a long trial, the Trial Judge had the best possible basis for judging credibility, resolving ambiguities of language, drawing inferences and arriving at a correct determination on Plaintiff's intention. It is impossible to produce a record here that will place the Appellate Courts in a position equivalent to that enjoyed by the Trial Judge.

In refusing to draw inferences and resolve ambiguities differently from the Trial Judge, the Court of Appeals fol-

lowed the latest decisions in this Court. In *United States v. National Ass'n. of Real Estate Bds.*, 339 U. S. 485, 70 S. Ct. 711, 94 L. Ed. 1007 (1950), this Court held that it could not set aside a finding merely because it might give the facts another construction or resolve the ambiguities differently from the Trial Judge. In *Timken Roller Bearing Co. v. United States*, 341 U. S. 593, 71 S. Ct. 971, 95 L. Ed. 1199 (1951), this Court refused to set aside the findings of the Trial Court where the essence of the dispute was on the proper inferences to be drawn from the evidence in the record. This Court further held that a request to review the propriety of the inferences drawn by the Trial Court was in effect an invitation to try the case *de novo*, an unacceptable invitation.

In its brief, Defendant seeks to show that the Court of Appeals' decision conflicts with the decisions in other circuits because the court did not, upon its review of the facts, substitute its judgment for that of the Trial Court and draw its own inferences and conclusions from the evidence. Defendant urges that where there is no controversy on the weight of the evidence or on matters of credibility and the facts are undisputed, an appellate court is obliged to exercise an independent judgment and draw its own inferences and conclusions. We have already pointed out (1) the facts on Plaintiff's citizenship *are* disputed; (2) there *is* considerable controversy as to the weight of the evidence; (3) there *is* a dispute on matters of credibility, and (4) much of the evidence relied upon by Defendant is ambiguous and equivocal. In those circumstances, the Court of Appeals had no occasion to consider the rule for which Defendant contends. In any event, the rule as stated in Defendant's brief is not in accord with the decisions in any circuit. Although, on the facts

assumed by Defendant, courts have held that the inferences drawn by the Trial Court are not conclusive, no court—including those whose decisions are cited on page 12 of Defendant's brief—has held that inferences drawn or findings made by a Trial Court from undisputed evidence are subject to a *full* review and the *exercise of independent judgment.* Some review there may be, but it is not a full review with an exercise of independent judgment as upon a trial *de novo.* The correct statement of the rule is found in 3 Am. Jur. (Appeal & Error) Sec. 903:

> "The rule that findings upon undisputed or unconflicting testimony do not carry the same weight as those based upon probative disputed facts *applies only where but one conclusion can reasonably be drawn from the evidence.* Findings based upon undisputed evidence from which different or conflicting inferences may reasonably be drawn are as conclusive on the appellate court as though based directly on conflicting evidence." (citing numerous cases) (Italics supplied.)

The rule is similarly stated in 5 C. J. S., Appeal and Error, 1656 (h).

II. Review of Mixed Questions of Law and Fact

In a further attempt to extend the scope of appellate review into the realm of trial *de novo* Defendant has devoted considerable space in its brief to the proposition that citizenship is a mixed question of law and fact and to the contention that on such a question an Appellate Court will give a full review complete with exercise of independent judgment. The authorities do hold that domicile or citizenship is a mixed question of law and fact, but the Courts, including the

Court of Appeals in the present case, hold that it is mainly a question of fact.[4] No authority has been found for the proposition that fact issues are to be tried in Appellate Courts. The problem of what is law and what is fact and the problem of coping with mixed questions of law and fact are not amenable to an easy solution. However, it is easy to say what is *not* the correct solution. The solution is not to treat law as fact or fact as law. A mixed question of law and fact—by definition—is not all law and is not to be reviewed as such. The correct rule on review of mixed questions is the one followed by the Court of Appeals in this case when it held that on a mixed question of law and fact the determination of the fact is for the trier of fact and such determination will not be reversed unless "clearly erroneous." (R. 96)

This rule is completely in accord with the decision of this Court in *First National Bank v. Hartford,* 273 U. S. 548, 47 S. Ct. 642, 71 L. Ed. 767 (1927), which is cited on page 11 of Defendant's brief. There this Court stated: (273 U. S. 552, 47 S. Ct. 463)

> "The question is thus a mixed one of law and fact, and in dealing with it we may review the facts *in order to correctly apply the law.*" (citing cases) (Italics supplied.)

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[4] *Maple Island Farm, Inc. v. Bitterling,* 196 F. (2d) 55 (8th Cir. 1952) (R. 96); *Chicago and N. W. Ry. Co. v. Ohle,* 117 U. S. 123, 6 S. Ct. 632, 29 L. Ed. 837 (1886); *Philadelphia and Reading Ry. Co. v. Sherman,* 230 Fed. 814 (2d Cir.); *Hopkins v. Comm'r.,* 320 Mass. 168, 68 N. E. (2d) 669 (1946); *Beasley v. Beasley,* 93 N. H. 446, 43 A. (2d) 154 (1945); *Bailey v. Bailey,* 93 N. H. 259, 40 A. (2d) 581 (1945); *Ratkowsky v. Browne,* 267 App. Div. 643, 47 N. E. (2d) 905 *appeal denied* 268 App. Div. 835, 50 N. Y. S. (2d) 464 (1944); *Kroehnke v. Gold Creek Mining Co.,* 102 Mont. 21, 55 P. (2d) 678 (1936); *Squire v. Vasquez,* 52 Ga. App. 712, 184 S. E. 629 (1936).

This Court did not say that upon review it would exercise an independent judgment on the facts. If the decision is read in full it discloses that although the law was fully reviewed, *the finding of the Trial Court was reviewed only for the purpose of determining whether it was supported by the evidence.* Furthermore, an examination of the decisions cited in the *First National Bank* case as authority for reviewing the facts in a mixed question of law and fact, clearly shows that the sole purpose of such review is to determine whether under correct rules of law, the evidence is sufficient to warrant the determination made or whether, on the contrary, the determination is so clearly erroneous that it cannot be permitted to stand. See also *United Gas Public Service Co. v. State of Texas,* 303 U. S. 123, 58 S. Ct. 483, 82 L. Ed. 702 (1937).

III. Legal Presumptions Governing Citizenship

Defendant's assignment of error on this subject rests upon a mistaken conclusion as to the legal presumptions applied by the Court of Appeals. The confusion apparent in this assignment of error arises from the failure of Defendant's counsel to reconcile the presumptions which govern the determination of domicile and citizenship. It is well settled that, nothing more appearing, the place where a person lives is, *prima facie,* presumed to be his legal domicile.[5] It is equally well settled that a domicile once acquired is presumed to continue, and that the burden of proving a change rests upon

[5] See cases cited on Page 12 of Defendant's brief.

the party alleging it.[6] However, it must be understood that the presumption as to continuance of original domicile can be rebutted by the presumption of domicile at a place of subsequent residence *only if* such residence is wholly inconsistent with an intent to return to the original domicile.[7] In the present case, Defendant makes the unfounded assumption that the Court of Appeals failed to recognize and consider the presumption of domicile from residence. On the contrary it is apparent that the Court of Appeals considered this presumption but was convinced upon the record that it did not apply because there was abundant evidence to show that Plaintiff's presence in Venezuela, North Africa, New York and elsewhere was occasioned solely by the nature of his work *and was not inconsistent with retention* of his *Oklahoma* citizenship.

In declining to give controlling effect to the presumption urged by Defendant, the Court of Appeals was merely recognizing that Plaintiff's temporary residence in Venezuela on business[8] did not raise a presumption that his domicile had changed to that country. This was clearly in accord with the decision of this Court in *Ennis, Admr. v. Smith et al.*, 14

[6] *Ennis v. Smith*, 14 How. 400, 14 L. Ed. 472 (1852); *Mitchell v. United States*, 21 Wall. 350, 22 L. Ed. 588 (1874); *Anderson v. Watts*, 138 U. S. 694, 11 S. Ct. 449, 34 L. Ed. 107 (1891); State of Texas v. State of Florida, 306 U. S. 398, 59 S. Ct. 563, 83 L. Ed. 817, 121 A. L. R. 1179 (1939); *Sweeney v. District of Columbia*, 113 F. (2d) 25 (App. D. C. 1940); Shilkret v. Helvering, 138 F. (2d) 925 (App. D. C. 1943); *Welsh v. American Surety Co. of N. Y.*, 186 F. (2d) 17 (5th Cir. 1951).

[7] *Ennis v. Smith*, 14 How. 400 14 L. Ed. 472 (1852); *United States v. Knight*, 291 Fed. 129 (D. C. Mont. 1923) *aff'd.*, 299 Fed. 571 (9th Cir. 1924); 19 C. J., Domicile, § 67b.

[8] It must be remembered that, at Defendant's request, Plaintiff left Venezuela in 1947 and went to New York to help promote and manage International Trade Service, Inc., and that from then until April 1948, he travelled in Mexico and the Caribbean Islands for that new company. In April 1948 Defendant sent Plaintiff to Venezuela under an entirely new contract which in turn was cancelled seven months later, giving rise to this suit. (R. 86, 87, 88) Plaintiff had gone to Venezuela under the contract in suit only nine months prior to commencing this case.

How. 400, 14 L. Ed. 472 (1852), cited on page 12 of Defendant's brief. There it was held that the place of residence is *prima facie* the domicile *unless* it appears that the residence is for some particular purpose expected to be only of a temporary nature, *or* in the exercise of some particular profession, office or calling. In such a case the presumption of domicile from residence does not apply. Here there was abundant evidence to show that Plaintiff's various residences outside Oklahoma were merely temporary *and* in the exercise of his calling as an export trade specialist and for sales promotion in foreign markets.

IV. Burden of Proof on Issue of Citizenship

The burden of proof in this case is best explained by the following quotation from 17 Am. Jur., Domicile, 640:

> "The rule is well settled that the burden of proving change of domicile is on the person who alleges it. If a party's right to affirmative relief depends on showing that his domicile has been changed, clearly the burden of proof as to the issue is on him. If, on the other hand, his right to relief depends on showing the continuance of domicile in a particular place, *then a showing that he once resided in the place makes out a prima facie case.* The presumption casts upon the other party the duty of going forward with the evidence to meet the prima facie case created thereby."

Since Plaintiff's right to affirmative relief was dependent upon his proving all jurisdictional facts, Plaintiff had the burden of proving his allegation of Oklahoma citizenship. His burden was to prove a *prima facie* case. He did so to

such an extent that the matter stood unquestioned by anyone until *after* judgment. (R. 82)

When the duty fell to Defendant to go forward with the evidence to rebut Plaintiff's *prima facie* case, no evidence was offered. In the absence of contest, there was no occasion for Plaintiff to offer more than the minimum required to prove his *prima facie* case. After judgment, Defendant seized upon the fact that Plaintiff had resided outside Oklahoma and then *for the first time* sought to assert that he had thereby lost his domicile and citizenship in Oklahoma. Defendant clearly failed to carry its burden of going forward with the evidence to meet Plaintiff's *prima facie* case.

The Court of Appeals' opinion shows that in judging the sufficiency of the evidence on this issue, the following well settled rules were considered: (R. 96)

1. That the burden of proving a change of domicile from Oklahoma to Venezuela rested on Defendant, the party alleging it. (See footnote 6, *infra*).

2. That proof of a change of domicile must be clear and convincing.[9]

3. That more evidence is required to establish a change of domicile from one nation to another than from one state to another.[10]

4. That less evidence is required to prove a continuity of Oklahoma citizenship and domicile than to establish a new domicile.[11]

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[9] *Sweeney v. District of Columbia*, 113 F. (2d) 25 (App. D. C. 1940); 28 C. J. S. Domicile, § 16.

[10] *United States Trust Co. v. Hart*, 150 App. Div. 413, *aff'd*, 208 N. Y. 617 (1912); In re *Lyon's Estate*, 117 N. Y. Misc. 189, 191 N. Y. Supp. 260 (1921); *McEwen v. McEwen*, 50 N. D. 662, 197 N. W. 862 (1924); *Lord v. Colvin*, 4 Drew 366, 62 Eng. Reprint 141 (1859); *Cruger v. Phelps*, 21 Misc. 252, 47 N. Y. Supp. 61 (1897). In the latter case the Court held that a change of domicile to a foreign country is so injurious to legal rights and relationships that it should be proved by the clearest and most convincing evidence.

[11] 28 C. J. S., Domicile, § 16.

In giving effect to these rules the Court of Appeals' decision in no way conflicted with the decisions of this Court.

Nor can any basis for a conflict of decisions be found in the Court of Appeals' statement that:

> "He [Plaintiff] was not asked and did not say as a witness that he intended to remain in Venezuela either indefinitely or permanently. His intention must be deduced, therefore, from all the circumstances in evidence."

If a man's intention with respect to his domicile is not expressly stated, how is it to be found except by deduction from all the circumstances in evidence? Certainly it should not be presumed from residence alone where the evidence as a whole shows that presumption to be incorrect. If a change of residence were the sole proof required to show a change of domicile, it would destroy the long standing rule that to constitute a change of domicile two things are indispensable:[12]

1. residence in the new locality, and
2. the intention to remain there.

If an intention to remain in Venezuela is requisite to showing a change of domicile to that country, no error of law can be found in the Court of Appeals' observation that Plaintiff did not at any time express such intention.

V. The Evidence is Clearly Sufficient to Prove Plaintiff's Oklahoma Citizenship

A mere summary of the evidence on Plaintiff's words and actions as they relate to his Oklahoma citizenship furnishes a complete answer to Defendant's belated and unsupported

[12] *Mitchell v. United States*, 21 Wall 350, 22 L. Ed. 588 (1874)

contention that there is insufficient evidence to sustain the finding that Plaintiff was a citizen of Oklahoma when this action was commenced in January of 1949.

1. Plaintiff answered one of Defendant's pre-trial interrogatories under oath and stated therein that his *permanent* residence was in Oklahoma. In the same answer he described Venezuela as merely his "place of residence"—omitting the word "permanent" in describing it. (R. 51)

2. On cross examination at the trial he again affirmed that his permanent residence was in Oklahoma and that he was merely residing in Venezuela, (R. 51) stating, "I am not a lawyer but I think that is true."

3. He came to Oklahoma as a small child, having been born in Montana. (R. 69)

4. He attended grade school in Oklahoma. (R. 69)

5. He attended high school in Oklahoma. (R. 69)

6. He attended night school at Tulsa, Oklahoma. (R. 69)

7. After he finished his schooling, he worked for many years as a secretary and stenographer for a business firm in Tulsa, Oklahoma. He continued in this work until 1935 when he was 30 years of age. (R. 69)

8. From 1935 until the early part of 1943, he worked on five different foreign assignments on three continents—North America, South America, and Africa—and in the Guineas and West Indies. He was employed by Tulsa, Oklahoma business firms on four of those five assignments. The fifth assignment was on work for the Export Division of International Harvester. (R. 84, 85)

9. During 1943 and part of 1944, he was employed by the United States government and sent to Venezuela on a special assignment. (R. 85)

10. During the rest of 1944 and part of 1945, he engaged in work which consisted largely of working in the United States to secure and expedite shipment of American trucks and automobiles to a Venezuela employer. (R. 85)

11. From 1945 to October of 1948, he was engaged in work for Defendant and given assignments requiring travel and work in Mexico, Venezuela, the Caribbean, Puerto Rico, Cuba, New York City and other parts of the United States. (R. 85 through 88)

12. When Defendant cancelled Plaintiff's employment contract in October of 1948, Plaintiff secured counsel in Minnesota and in January of 1949 commenced this action. (R. 88)

The foregoing evidence shows that Plaintiff has had a long and strong attachment to Oklahoma. It shows that Plaintiff, who was age 45 at the time of trial,[13] had spent approximately two-thirds of his life in Oklahoma. It shows that he was employed by Tulsa business firms until he was 38 years of age. Although the evidence shows that, in the exercise of his calling as an export specialist and salesman in foreign trade, Plaintiff was required to travel widely and frequently to live and work in foreign countries to carry out various business projects and assignments, there is nothing to show that he chose to abandon his Oklahoma citizenship or take up a domicile in any of the places he worked or travelled.

With respect to the evidence on Plaintiff's work and travel outside Oklahoma it must be remembered that

> 1) "An American citizen does not become a permanent resident of a foreign country by simply taking employment there with an American firm, however long

[13] R. 69

his employment may continue.[14] *United States v. Knight,* 299 Fed. 571, 574 (9th Cir. 1924) *affirming,* 291 Fed. 129 (D. C. Mont. 1923)

2) A removal from the existing domicile does not work a change or forfeiture of it where it can be shown or inferred from the circumstances that the removal is for a particular purpose expected to be only of a temporary nature, or in the exercise of some particular profession, office or calling. *Ennis v. Smith, et al.,* 14 How. 400, 14 L. Ed. 472 (1852).

3) A person does not lose his citizenship and domicile merely by taking up a residence at a place the United States Government sends him to serve. *Sweeney v. District of Columbia,* 113 F. (2d) 25, 22 App. D. C. 30, 129 A. L. R. 1370 *cert. denied,* 310 U. S. 631, 60 S. Ct. 1082, 84 L. Ed. 1402 (1940); *Pace v. District of Columbia,* 135 F. (2d) 249, 77 App. D. C. 332 aff'd, 320 U. S. 698, 64 S. Ct. 406, 88 L. Ed. 408 (1943).

4) A person does not lose his existing domicile and citizenship by taking up a residence at a place where he is employed by others to work on a project or assignment of limited duration. *Butler v. District of Columbia,* 153 F. (2d) 617 (App. D. C. 1945); *Watters v. Ralston Coal Co.,* 38 F. Supp. 16 (D. C. Pa. 1941); *Hines, Dir. Gen. of Railroads v. Gaines,* 192 Ky. 198, 232 S. W.

[14] The cases are legion in which American and English Courts have held that long periods of residence did not work a change of domicile or citizenship. *Hodgson v. De Beauchesne,* 12 Moore P. C. C. 285, 14 Eng. Reprint 508 (1858) [23 years]; *Jopp v. Wood,* 34 Beav. 88, 55 Eng. Reprint 566 (1864) *aff'd* 4 De G. J. & S. 616, 46 Eng. Reprint 1057 (1865) [25 years]; *Capdeville v. Capdeville,* 2 H. & C. 985, 21 L. T. (N. S.) 660 (1869) [20 years;] *In Goods of West,* 6 Jur. (N. S.) 831 (1860) [14 years]; *Douglas v. Douglas,* 41 L. J. Ch. 74, L. R. 12 Eq. 617, 25 L. T. 530 (1871) [a lifetime]. *Jopp v. Wood and Capdeville v. Capdeville, supra* are cited with approval in *Harding v. Standard Oil Co.,* 182 Fed. 421, 425 (C. C. N. D. Ill. 1910).

United States Trust Co. v. Hart, 150 App. Div. 413, *aff'd* 208 N. Y. 617 (1912) [27 years]; *Dupuy v. Wurtz,* 53 N. Y. 556 (1873) [11 years]; *N. Y. Life Ins. & Trust Co. v. Viele,* 161 N. Y. 11, 55 N. E. 311, 76 Am. St. Rep. 238 (1899) [30 years]: *In re. Lyon's Estate,* 117 N. Y. Misc. 189, 191 N. Y. Supp. 260 (1921) [20 years]; *Sproat v. Hall,* 189 Mich. 28, 155 N. W. 361 (1915) [15 years]

624 (1921); *Bethlehem Steel Co. v. Traylor,* 158 Md. 116, 148 Atl. 246, 73 A. L. R. 479 (1930).

Now Defendant has left no page unturned (out of a total Record of nearly 5,000 pages) in its efforts to show that the evidence weighs more heavily for the position which Defendant has taken. In this effort, Defendant has gleaned every scrap of equivocal evidence and attempted to turn it to the purpose of showing that Plaintiff had some supposed permanent attachment to Venezuela.

Plaintiff, of course, has had extensive business experience in Venezuela and in all Latin American countries. As an export specialist and salesman in foreign trade, Plaintiff has gone where his work has taken him. Since Plaintiff is expert in Latin American trade, he has spent and will probably continue to spend some time periodically in South America, Mexico and other foreign areas. It should be noted however, that much of Plaintiff's business activity in Latin America is no different from that of Defendant when it took a 49% interest (through the person of Hadrath, its vice president) in the Venezuelan Corporation Distribuidora Valle Verde. Although Defendant's brief paints an hyperbolic picture of Plaintiff engaging in vast proprietary activities headquartered out of Caracas, the true picture is that none of his business activities in Venezuela, except powdered milk, have involved actual participation in active management of any business.

Although Defendant places great significance on Plaintiff's casual use of the word "home" in referring to his place of abode when he was working in Venezuela, it is manifest that no intention to remain in Venezuela can be spelled out of these references. Plaintiff also referred to his mother's

place of residence, and his overnight hotel room in Stillwater, Minnesota as "home." (R. 50, 51, 75) The important fact is when he was called upon by Defendant's counsel to make a distinction, he characterized Oklahoma as his *permanent* residence and Venezuela merely his residence (R. 51)

Defendant places great reliance on the fact that Plaintiff paid taxes in Venezuela and secured a divorce there. It is of course elementary that a person may be required to pay income taxes in a foreign country irrespective of his citizenship, nationality or domicile. It is equally elementary that the residence required to secure a divorce is not the same as citizenship and that a person may secure a divorce in a place where he has neither domicile nor citizenship. *Harding v. Standard Oil Co.*, 182 Fed. 421 (C. C. N. D. 1918) Defendant made no attempt to prove that Venezuelan law requires any special length or kind of residence in Venezuela as a basis for divorce jurisdiction. It is of course well settled that a person may retain his domicile at a place where he has no dwelling. *Restatement, Conflict of Laws*, Sections 9b and 16d (1934).

CONCLUSION

Defendant, having engaged Plaintiff in business assignments which required him at various times to go to Mexico, to Minnesota, to Venezuela, to the Caribbean Islands, and to New York, should not now be heard to assert that Plaintiff's fulfillment of these business obligations worked a forfeiture of his Oklahoma citizenship, and his access to the Federal Courts.

An examination of the Record submitted shows that the finding on Plaintiff's citizenship is not "clearly erroneous" and that there is no conflict on any rule of law followed by the Court of Appeals. Consequently, Plaintiff prays that the Defendant's Petition be denied.

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 219

MAPLE ISLAND FARM, INC.
Petitioner,

vs.

WALTER BITTERLING,
Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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This reply brief will be devoted solely to the correction of certain misleading assertions of fact in Respondent's brief —such as can be discussed with brevity.

1. First there is sought to be conveyed the impression that there may have been evidence outside of the record before the Court of Appeals, and now before this Court, bearing on the question of Respondent's state citizenship. (P. 7) *

By its order of October 8, 1951, the Court of Appeals

* "P" in parenthesis refers to pages of Respondent's brief.
"R" in parenthesis refers to pages of the record.

granted Appellant (Petitioner here) leave "to prepare and print all of the record pertaining to the issue of jurisdiction". (R. 24)

Pursuant to this order Petitioner did file in the Court of Appeals in narrative form all of the Record regarded as being material on the issue of jurisdiction. (R. 29-64)

By its order of January 14, 1952, the Court of Appeals granted Appellee (Respondent here) leave "to print and file such supplemental record bearing upon this issue as he may be advised". (R. 65)

Pursuant to this order Respondent filed a supplemental record in narrative form of additional evidence claimed to be material on this issue. (R. 68-88)

It must be assumed that this record and supplemental record contain all that the parties deemed essential to the consideration and decision of the question of jurisdiction. The fact is that while the record in the trial court is large, the portion of it having any bearing upon the issue of jurisdiction is very brief. That portion was included in the record before the Court of Appeals. It was upon that record the Court of Appeals made its decision. That record is now before this Court.

2. Respondent complains that Petitioner (as Defendant below) did not "actively contest" the question of jurisdiction in the trial court. (P. 2) Respondent's state citizenship was put in issue by the pleadings. (R. 29, 34) The burden was upon Respondent (Plaintiff). Until he introduced some evidence reasonably tending to establish his allegation of citizenship of Oklahoma there was no occasion for Petitioner to "contest" with Respondent on that issue. Until the trial closed Petitioner could not know what the final evidence on

the issue would be. There was no evidence sufficient to make out a *prima facie* case of Oklahoma citizenship.

The parties submitted to the trial court proposed findings. Respondent's first request was for a finding that "Plaintiff is a citizen of the State of Oklahoma and of the United States". Petitioner countered with a request for a finding that "Plaintiff is a citizen of the United States and is and during the times with which this action is concerned has been a resident of Caracas, Venezuela, South America".

After the Court had found on jurisdiction in accordance with Respondent's request, Petitioner moved to amend by striking this finding and substituting a finding that Plaintiff was not a citizen of any state (R. 62, 63) and moved for a conclusion of law that the Court was without jurisdiction and for a dismissal. (R. 63)

3. Respondent's brief says:

> "Since the evidence on plaintiff's intention was necessarily circumstantial, the trial Court was obliged to draw many inferences from the evidence to determine plaintiff's intention." (P. 6)

The evidence of Plaintiff's intention was not "necessarily circumstantial." It was perfectly competent for the Plaintiff to testify directly as to his intention. He could have testified, had such been the fact, that notwithstanding his long residence in Caracas, Venezuela, he always intended to return to Oklahoma. He gave no such testimony. Not only did he fail to testify that he ever entertained the slightest intention of returning to Oklahoma or of ever again residing in that state, but also failed to testify to any intention whatever respecting residence or domicile anywhere. (R. 29-61; 67-88)

4. Respondent's brief asserts that the facts on his citizenship are disputed and that there is considerable controversy as to the weight of the evidence and that there is a dispute on matters of credibility. (P. 8)

No such dispute, controversy or question as to credibility is disclosed by the record. (R. 29-64; 67-88) Respondent concedes that "The evidence is largely plaintiff's own activities and testimony", but claims that "the evidence upon which petitioner places principal reliance is made up of certain documents and testimony which contain ambiguous language".

While there is dispute as to Respondent's credibility and weight of the evidence on other issues, on the issue of jurisdiction Petitioner, in the Court of Appeals and here, relies *wholly* on the testimony of Respondent and upon documents signed by him except one official document issued to him at his instance (Defendant's Exhibit "V," R. 60) and a portion of an affidavit introduced by Respondent. (Plaintiff's Exhibit 145, R. 60, 61) For its bearing on the issue of jurisdiction, the verity of none of this evidence is questioned by either party.

5. The following appears in Respondent's brief:

> "The Yellow Cab Company case, involving as it did a matter of intent, is clearly in point on the present case where, the fact of a business residence in Caracas for less than one year preceding this action being admitted, the determination of plaintiff's Oklahoma citizenship rested primarily upon determination of plaintiff's intention." (P. 6)

The inference from this would seem to be that Petitioner had admitted that Respondent had a business residence in

Caracas for less than one year preceding this action. There was no such admission by Petitioner. It was Respondent who in his brief in the Court of Appeals admitted residence in Caracas "for about eleven months preceding this action". The residence was not characterized as a "business" residence. The evidence in the record proves a residence of Respondent in Caracas for many years prior to the commencement of the action. He admitted the establishment of his *home* in Caracas as early as 1944, six years before commencement of the action (R. 44) and there is no evidence that this home was ever abandoned.

6. Respondent's brief says:

> "Plaintiff answered one of Defendant's pre-trial interrogatories under oath and stated therein that his *permanent* residence was in Oklahoma." (P. 16)

Respondent (Plaintiff) did not so answer. The question was:

> "Of what *state* or country is plaintiff now a citizen? What is his place of residence?"

The answer was:

> "Plaintiff is a citizen of the United States of America. Plaintiff's place of residence is Caracas, Venezuela. Plaintiff's *last state* of *permanent* residence *in the United States*, Oklahoma. * (R. 51)

Here Respondent was called upon to name both the country and the *state* of which he was a citizen. He named the country, but named no state of which he claimed to be a citizen. When confronted with this answer on the trial he did not amplify it. (R. 51)

*Italics supplied.

7. Again, referring to Respondent his brief says:

> "He came to Oklahoma as a small child, having been born in Montana." (P. 16)

There is no evidence that Respondent came to Oklahoma as a small child. The nearest thing to such evidence is his testimony that he attended grade school in Montana. (R. 42) What grade does not appear. It does appear that at some time between the time when he was a young child and his arrival at age thirty he resided in Montana, North Dakota, South Dakota, Illinois, Alabama, and Oklahoma. (Id.) It does not appear whether he resided in these five states between the time of his birth and his going to Montana, or between the latter date and the time of his leaving Oklahoma for Venezuela in 1934 or 1935. (Id.)

8. Again:

> "After he finished his schooling he worked for many years as a secretary and stenographer for a business firm in Tulsa, Oklahoma." (P. 16)

The only justification for such a statement was testimony that in 1934 he was a stenographer and secretary for a firm in Tulsa, Oklahoma. (R. 42)

9. Again:

> "From 1945 to October of 1948 he was engaged in work for defendant and given assignments requiring travel and work in Mexico, Venezuela, the Caribbean, Porto Rico, Cuba, New York, and other parts of the United States." (P. 17)

Respondent had only one "assignment" from Petitioner. That was employment in Caracas in 1948. (R. 47) He had previously, beginning in 1946, served as president of a Vene-

zuelan corporation which acted as distributor of Petitioner's products in Venezuela, on a purchase and resale basis. (R.46)*

Incidentally it should be understood that pages 16 to 20 of Respondent's "Supplemental Record on Issue of Jurisdiction" (R. 84-88) is not original narration of evidence but is a compilation of alleged facts presumably derived or claimed to be, from the actual narrations of the evidence as found on pages 42 to 61 and 68 to 82 of the Record. It is to this compilation that Respondent refers as authority for a number of statements made on pages 16 and 17 of his brief.

Respectfully submitted,

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*Having no bearing on the present issue were two earlier trips of Respondent to Mexico in company with an officer of Petitioner. (R. 75)